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No. 98-1995

In The

Supreme Court of the United States

October Term 1998

Graphic Communications
International Union, Local 1B

Petitioner,

v.

Bureau of Engraving, Inc.

Respondent.

Reply Brief in Support of Petition For a Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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DISCUSSION

The employer insists that the Eighth Circuit did not reexamine the facts or reach its own factual determinations in reversing the District Court and the two independent arbitration awards. However from the face of the employer's Brief in Opposition to Petition for Writ of Certiorari it becomes clear that the Eighth Circuit did ignore the record and base its decision on its own erroneous factual assumptions. Specifically the Eighth Circuit concluded that a monetary remedy for overtime violations under the parties newly negotiated overtime policy was improper because such a remedy had been rejected by the employer and "(n)o other remedy, apparently, was proposed..." during negotiations. (Appendix Page A2.) It is factually wrong to suggest that the only remedy discussed in negotiations for overtime violations was a monetary payment. Even the employer acknowledges that in negotiations:

> The Bureau also suggested that neither it nor (the Union) be responsible for paying a monetary remedy if an employee is skipped in overtime rotation. (Employer's Brief page 1-2).[1]

[1] There is no basis whatsoever for the employer's statement that the Union "in essence, adopted this suggestion in all material respects." (Employer Brief page 2.) The Union never agreed that there would be no monetary remedy for overtime violations, neither arbitrator remotely suggested that this was the case and there is no dispute that the employer dropped its written proposal for non-monetary relief during negotiations.

This "suggestion" was in the form of a specific written proposal for language the employer expressly sought to include in the parties' collective bargaining agreement.[2] The language which the employer sought is as follows:

> The Union and the Company assume no responsibility whatsoever for missed overtime opportunities and will not pay for such.

The record demonstrates that after the employer proposed this language, Local 1B rejected its inclusion in the contract and the employer dropped that language from its subsequent written proposals. This language expressly sought by the employer was not included in the contract. Both arbitrators were aware of this fact which clearly was a key to their respective determinations that any alleged past practice of non-payment for overtime violations did not survive the amendment to the overtime allocation procedures.

In reaching its decision the Eighth Circuit also ignored the key factual determination of both arbitrators that in the negotiations the overtime allocation procedure was substantially revised. Both

[2] The union notes that the employer's repeated characterization of its proposal as merely a "suggestion" seems deliberately designed to obscure the fact that this was a written contract proposal submitted for inclusion in the collective bargaining agreement but ultimately dropped in negotiations.

arbitrators, in their independent proceedings, concluded that any past practice of a non-monetary remedy developed under the old procedure did not survive under the new procedure. In fact Arbitrator Lundberg agreed with Local 1B that a make-up opportunity remedy was inconsistent with the new procedure and itemized various ways that a make-up remedy would fail to adequately respond to violations of the new procedure. (Award of Lundberg, Appendix page A26, A32.) Arbitrator Lundberg's list of inadequacies in a make-up opportunity remedy for violations of the new procedures are specific factual determinations which the Eighth Circuit simply chose not to consider.

Another problem originates from the Eighth Circuit's failure to recognize the fact that the employer did expressly seek, but failed to obtain, inclusion of a provision calling for no monetary relief for its overtime violations. By failing to acknowledge that the employer had sought specific remedy language in the contract, the Eighth Circuit avoided addressing the implications of such an effort. The very fact that the employer felt compelled to seek such language demonstrates that at negotiations the employer recognized that it could not rely on an alleged past practice developed under the former contractual provision as dictating the appropriate remedy for overtime violations once the overtime allocation procedures were substantially revised.

It is on this point that the case of Aeronca Inc. v. NLRB, 650 F.2d 501 (4th Cir. 1981), is significant. In that case the Fourth Circuit recognized that where a party to a collective bargaining agreement seeks to add express language securing an existing practice into the contract, but ultimately drops that effort, the party cannot subsequently claim that benefit as a past practice. The equitable reasoning behind Aeronca is equally applicable under either labor or arbitration proceedings. A party who seeks to expressly secure a previously unwritten practice into the collective bargaining agreement but either fails or abandons that effort cannot rely on past practice to subsequently claim that benefit. Again, the very fact that a party feels it necessary to seek such language demonstrates that the party questions whether a binding past practice exists.

That principle is even more compelling where the underlying basis for the previous practice has been substantially altered. As noted in Local 1B's earlier submission, arbitrators routinely agree that a past practice does not survive amendment to the underlying contractual language. For example see Thrifty Corp., 85 LA 780, 782-83 (Arb. Gentile 1985); Memphis Light, Gas & Water Div., 69 LA 687, 696 (Arb.. Simon 1977). In the instant case both parties agreed that the existing equalization of overtime opportunities process was not working and agreed to replace it with a strict rotation basis. Yet despite the contractual modification the employer continues to

seek a remedy for violations of the new strict rotation procedure which is consistent with the deleted equalization process but not the new strict rotation concept. As noted by Arbitrator Lundberg:

> Under the prior contract overtime opportunities needed to be equalized. The practice of making up overtime was consistent with the concept of equalizing overtime.
>
> However, making up overtime is not consistent with the new requirement that overtime be offered on a straight rotation.

(Appendix pg. A32.) In the other arbitration proceeding Arbitrator Jacobs also recognized that the make up opportunity remedy sought by the employer was not consistent with the newly negotiated straight rotation process. (Appendix pg. A24-25.)

In the instant case, both arbitrations were conducted separately and independently and neither arbitrator was aware of the other's analysis. Still both arbitrators were aware of the parties' bargaining history. Both arbitrators knew that in former agreements overtime was allocated on an equalization basis. Both arbitrators listened to evidence that under this equalization process overtime violations were, at times, remedied with make-up opportunities. Both arbitrators heard that

the overtime equalization concept was the source of ongoing problems between the parties. Both arbitrators received evidence that the parties mutually sought and agreed upon substantial revisions to the former overtime allocation procedures in the critical negotiations. Both arbitrators recognized that any practice of resolving overtime violations with make up opportunities had occurred under the equalization process. However both arbitrators independently reached the same factual conclusion that the make up remedy sought by the employer for violations of the new policy was inconsistent with the new straight rotation process adopted by the parties.

In so concluding both arbitrators applied the common arbital standard that a past practice does not survive amendment to the underlying contractual language. The arbitrators' application of this standard was particularly appropriate where the undisputed evidence was that the employer had sought the express inclusion of a non-monetary remedy into the contract but abandoned that effort.

In this case the Eighth Circuit ignored the arbitrators' critical determinations concerning the inapplicability of any past practice and the consequences of a substantially revised overtime allocation procedure. In reaching its decision the Eighth Circuit ignored the arbitrators' factual conclusions and based its decision on the erroneous

factual conclusion that the only remedy for overtime violations proposed at negotiations was for monetary compensation and which was rejected by the employer. Even if that was the case, which it was not, the arbitrators' conclusions that a make up opportunity was inconsistent with the new straight rotation procedure was entitled to great deference. The Eighth Circuit's decision so far departs from the standard of deference to arbitration awards as to demand the exercise of this Court's supervisory power. See United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987).

The Employer wrongly asserts that each arbitrator's award failed to draw its essence from the collective bargaining agreement and past practices of the parties. At both arbitrations the evidence showed that whatever the past practice had been as to overtime disputes, the current grievances occurred under a new contract providing for a change in the distribution of overtime. The current contract provides for a distribution of overtime that is based on a straight rotation of opportunity, rather than on the old system which called for equalization in distributing overtime.

In their awards, both arbitrators summarized the arguments of the parties as to the past practice of settling overtime disputes under the old contract

language which provided for equalization of overtime. Both arbitrators noted that the prior practice of making-up overtime under a system designed to equalize the amount of overtime offered to employees did not survive as a "past practice" to remedy a new system of distributing overtime based on a straight rotation of overtime opportunities. Further, both arbitrators noted that a remedy of offering the next available opportunity for overtime as a make-up for a missed opportunity is not consistent with the new language of offering overtime on a straight rotation basis and would inevitably cause a new misapplication of overtime because the next opportunity for overtime would not be offered in rotation order as required by the contract.

CONCLUSION

Local 1B submits that the Court of Appeals decision, which reaches the unprecedented result of vacating two independent arbitration awards, so far departs from the standard of deference to arbitration awards as to demand the exercise of this Court's supervisory power. For the foregoing reasons Local 1B requests that this petition for writ of certiorari be granted.

Respectfully Submitted,
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